COPYRIGHT ROYALTY TRIBUNAL

37 CFR Part 310

[CRT Docket No. 91-3-SCRA]

1991 Satellite Carrier Rate Adjustment Proceeding

AGENCY: Copyright Royalty Tribunal.

ACTION: Final rule; Notice of adoption of Arbitration Panel's determination.

SUMMARY: The Arbitration Panel convened for this proceeding has determined that the satellite carrier royalty rate shall be raised to 17.5 cents for independent stations, 14 cents for syndex-proof independent stations and 6 cents for network and PBS stations. The Tribunal adopts the Panel's decision and rejects the petitions of both the copyright owners and satellite carriers.

EFFECTIVE DATE: The new rates shall go into effect May 1, 1992.

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SUPPLEMENTARY INFORMATION: In 1988, Congress created a satellite carrier compulsory copyright license for the retransmission of broadcast signals to satellite dish owners for private home viewing. Congress set the initial rates of 12 cents per subscriber per month for network stations.

Congress provided that the rates should be adjusted in 1991-92, first by negotiations, but if they proved unsuccessful, then by arbitration. Accordingly, when negotiations did not succeed, an arbitration panel was established. The Arbitration Panel held proceedings, and the Panel submitted its report to the Tribunal timely on March 2, 1992.

The Panel determined that the satellite carrier rates should be raised to 17.5 cents for independent stations, 14 cents for syndex-proof independent station, and 6 cents for network and PBS stations.

Section 119(c)(3)(F) of the Copyright Act gave the Tribunal 60 days to review the Panel's decision and directed the Tribunal to adopt the determination of the Panel unless the Tribunal found that the determination was clearly inconsistent with the criteria set forth by Congress.

On March 18, 1992, petitions were filed by the copyright owners and the satellite carriers urging the Tribunal to find, for different reasons, that the Panel's determination was clearly inconsistent with Congress' criteria. What follows is a discussion of the issues the parties raised.

Panel's Application of Congress' Criteria

Of the seven criteria set by Congress, the Panel found two of them inapplicable. First, there were no fees established by voluntary negotiations. Second, the last fees proposed in negotiations were considered by the Panel to be only beginning positions and therefore unusable.

Of the remaining five criteria, one concerned the average cost to cable systems of similar service, and the other four (Sec. 119(c)(3)(D)(i)-(iv)) were what were called "marketplace" factors. The panel concluded that Congress wanted the Panel "to consider approximate average cable cost and the four additional factors coequally." Panel, p. 17.

The copyright owners argued that while the Panel said it would consider these factors coequally, that in fact, "the average cable cost was calculated, and then a discounted marketplace rate was calculated merely to verify the average cable cost." Owners, p. 4. The owners argued marketplace value was not given independent and equal weight.

Conversely, the carriers argued that the Panel gave too much weight to the four marketplace criteria. According to the carriers, "average cable costs, the first consideration under the statute, should take priority in this proceeding. The other considerations essentially [should] serve as a 'safety net.'" Carriers, p. 8.

The Tribunal believes that the Panel should be credited with acting as it said it did. It first developed an average cable cost of 17.5 cents. Panel, p. 18. Then looking at an analogous marketplace of four cable networks, the Panel considered their average actual fees, 23 cents, and subtracted 5 cents for the value of insertable advertising, a value not available for retransmitted broadcast signals. The Panel concluded that a marketplace value of 18 cents for distant signals was reasonable. Panel, p. 24. Given the closeness of 17.5 cents and 18 cents, whether the Panel followed the co-equal weighing that the owners say is required, or whether the Panel followed the primary weight to average cable costs that the carriers say is required, the result would have been approximately the same. As such, it was not shown by either party that the Panel's decision was clearly inconsistent with Congress' criteria.

Ratio of Rates for Independent Stations and Network Stations

The 12 cents/3 cents rate Congress intitally established for independent station and network stations, respectively, represents a 4:1 ratio, the same ratio that exists in the cable rates. The Panel concluded, "we are not bound in law to continue the 4:1 ratio, * * * royalty parity is only one of several criteria Congress set for our consideration." Panel, p. 32. As a result, the Panel set a network rate of 6 cents, about 1.6 cents higher than what a 4:1 ratio would indicate.

The carriers argued that the 4:1 ratio in rates between independent and network stations must by law be preserved. The carriers reasoned that Congress intended parity between the satellite and cable industries, and that this was expressed by Congress' instruction to the Panel to look at average cable costs.

The owners, on the other hand, argued that the Panel should have adopted a 1:1 ratio, because of the Tribunal's ruling interpreting Section 119 to include network copyright owners as participants in satellite royalty distributions. 56 FR 20414 (May 3, 1991). Because network copyright owners are entitled to receive satellite royalties, but not cable royalties, the owners argued that full value should have been accorded network signals, and that the quarter value given network signals in cable retransmissions was legally irrelevant.

The Tribunal believes the Panel was not bound by either a 4:1 ratio or a 1:1 ratio. When the Tribunal issued its declaratory ruling concerning network copyright owners, we did not intend to prejudge any future ratesetting. We noted that in cable and in satellite, the pay-in may not necessarily correlate to the pay-out. Therefore, a 1:1 ratio is not required. However, we do believe the Panel had the authority to take our declaratory ruling into account, so that it was entitled to adjust the 4:1 ratio downward to reflect that network copyright owners are entitled to receive satellite royalties.

Incorporation of Syndicated Exclusivity Surcharge (Syndex) in the Rate

When the Panel determined that the average cable cost for independent stations was 17.5 cents, it looked to 1989. In that year, the cable rates included a syndex surcharge to compensate for the fact that the FCC rules no longer provided for blackout protection for syndicated shows. However, in 1990, the FCC reinstated blackout protection, and the Tribunal removed the syndex surcharge. Consequently, cable payments declined about 20%. The carriers argued that the

Panel's rates should have followed the 1990 cable rate structure.

The Panel noted the change in rates in 1990, but observed that in 1992, while copyright owners can demand blackout of cable programs and so no surcharge is necessary, copyright owners still have no comparable protection vis-a-vis satellite carriers. Therefore, the Panel concluded that looking at the 1989 rate structure which included the syndex surcharge was more appropriate. However, where satellite carriers deliver signals for which copyright owners can not demand blackout because they have conveyed national rights or for other reasons (otherwise known as "syndex-proof"), then the Panel agreed with the carriers that a 20% reduction was warranted, and adopted a 14 cents rate for syndex-proof independent stations.

The carriers argued that Congress provided a sole remedy for the issue of blackout protection, and that was to instruct the FCC to impose a blackout requirement on satellite carriers, if feasible. When the FCC found that it was not technically feasible to require carriers to blackout, the carriers contend it was not up to the Panel to devise a monetary solution.

However, as this might be one reading of section 119, it is equally reasonable to interpret the Panel's authority as allowing it to adjust rates in light of the FCC's action. We believe the carriers did not show where the Panel was clearly inconsistent with the Act, and we affirm the syndex portion of the 17.5 cents rate.

Definition of "Syndex-proof"

The Panel adopted a 14 cents rate for "syndex-proof" independent signals, but the owners asserted that this was ambiguous. In deciding whether a signal is syndex-proof, did the Panel intend for the ratepayer to look only at whether the signal itself was syndex-proof nationwide, or should the ratepayer consider the circumstances of the individual home viewer as well?

The owners believe the Panel intended a 14 cents rate only for signals that were syndex-proof nationwide. The carriers believe that the Panel intended to include the individual circumstances of the receiving dish.

The Tribunal agreed that some ambiguity existed and asked the Panel to clarify what it said on page 12 of its Report and in footnote 10. The Panel explained that the 14 cents rate applies "only to those signals which have eliminated any syndex problems on a nationwide basis." Letter, dated April 22, 1992. Accordingly, the Tribunal's regulations below reflect the intent of the Panel concerning "syndex-proof."

Effective Date of the Rates

The Panel adopted an effective date for the new rates of January 1, 1993. Panel, p. 35. The copyright owners argued that this was clearly inconsistent with section 119(c)(3)(G) which states that the Panel's decision becomes effective "on the date when the decision of the Tribunal is published in the Federal Register." The carriers argued that the legislative history spoke of an effective date of January 1, 1993, and, alternatively, that it was within the discretion of the Panel to set the effective date.

We agree with the owners that the law is clear that the new rates are effective upon publication of this decision in the Federal Register, which is May 1, 1992, and that where the law is clear, no resort to the legislative history is justified. The carriers have had personal notice of the change in rates since March 2, 1992, and do not have to make their first semiannual payment until July 31, 1992, so no inequity will result from an earlier effective date.

Other Issues

We acknowledge the other issues raised by the owners and carriers. The copyright owners questioned the way the Panel developed marketplace value from the owners' evidence and the carriers' evidence; they questioned the 50% valuation the Panel gave to network stations; and they questioned why the Panel further reduced the value of network stations another 25%. On the other hand, the satellite carriers questioned the Panel's inflation adjustment when cable payments appear flat; and they questioned the exclusion of Form 1 and 2 cable systems from the calculation of average cable costs.

While the Tribunal, if it had been sitting as the trier of fact, might have reached different conclusions, our role in reviewing the Panel's decision is limited. Unless it can be shown that the Panel actions were "clearly inconsistent" with Congress' criteria, we cannot overturn them. Accordingly, whatever merit these other issues might have, the Panel gave a rational basis for each of its conclusions, and we are required to defer to the Panel's judgment.

In conclusion, the Tribunal affirms the Panel's decision in all respects, except that the effective date is May 1, 1992. The Panel's full decision follows below.

APA "Good Cause" Showing

Section 553 of the Administrative Procedure Act states that rules may not become effective less than 30 days after publication in the Federal Register, except, among other provisions, where good cause is shown. Accordingly, the Tribunal finds that 17 U.S.C. 119(c)(3)(G) requires that the rates adopted by the Panel become effectively immediately upon publication in the Federal Register and thereafter finds good cause.

List of Subjects in 37 CFR Part 310

Copyright, Satellite.

For the reasons set forth in the preamble, the Tribunal adds 37 CFR part 310, a new part consisting of §§ 310.1 through 310.3, as follows:

PART 310—ADJUSTMENT OF ROYALTY FEE FOR SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS

Authority: 17 U.S.C. 119(c)(3)(F).

§ 310.1 General.

This part 310 adjusts the rates of royalties payable under compulsory license for the secondary transmission of broadcast stations under 17 U.S.C. 119.

§ 310.2 Definition of syndex-proof signal.

A satellite retransmission of a broadcast signal shall be deemed "syndex-proof" for purposes of § 310.3(b) if, during any semiannual reporting period, the retransmission does not include any program which, if delivered by any cable system in the United States, would be subject to the syndicated exclusivity rules of the Federal Communications Commission.

§ 310.3 Royalty fee for secondary transmission of broadcast stations by satellite carriers.

Commencing May 1, 1992, the royalty rate for the secondary transmission of broadcast stations for private home viewing by satellite carriers shall be as follows:

(a) 17.5 cents per subscriber per month for independent stations;

(b) 14 cents per subscriber per month for independent stations whose signals are syndex-proof; and

(c) 6 cents per subscriber per month for network stations and noncommercial educational stations.

Dated: April 28, 1992.

Cindy Daub,

Chairman.

Appendix

Note: This appendix will not appear in the Code of Federal Regulations.

Copyright Royalty Tribunal

Arbitration Panel

In the matter of Satellite Carrier Royalty Rate Adjustment Proceeding, March 2, 1992.

Report of the Arbitration Panel

Pursuant to section 119(c)(3) of the Copyright Act, as amended by the satellite Home Viewer Act of 1988 ("SHVA"), 17 U.S.C. 119(c)(3), the Arbitration Panel ("Panel") hereby reports to the Copyright Royalty Tribunal ("Tribunal") its determination of the fee to be paid in 1993 and 1994 by satellite carriers for the right to transmit secondarily to the public, for private home viewing, a primary transmission made by a broadcast station.

For the reasons set forth below, we find that the fee should be (a) 17.5 cents per subscriber per month for "superstations" whose signals, when distributed to the private home viewer, carry syndicated programming; (b) 14 cents per subscriber per month for superstations whose signals are "syndex-proof," as further discussed; and (c) 6 cents per subscriber per month for network stations, including public broadcasting stations.[1]

Background

The satellite carriers involved in this proceeding use satellites to distribute broadcast television station signals to owners of receiving terminals known as home satellite dishes ("HSDs"). Such transmissions are described generally as "distant" signals because they are transported beyond the local "over-the-air" reach of the broadcast television station. Monthly or annual charges for this service are collected from private home viewers or from intermediary "distributors" who contract with the viewers. Among the carriers' costs are payments to copyright owners for the rights to make commercial use of the content of the broadcast signals.[2]

In 1988 Congress adopted the SHVA, Public Law 100–667, 102 Stat. 3949. Among other features, the legislation granted a six-year compulsory copyright license to satellite carriers for the right to engage in secondary transmission of primary station broadcasts. 17 U.S.C. 119(a). The license was modeled upon, but also differed from, that granted to cable television operators by the 1976 Copyright Act, PL 94–553, 90 Stat. 2541, 17 U.S.C. 111.

For the first four years of the license, 1989–92, satellite carriers were to pay copyright royalties of 12 cents per subscriber for each superstation and 3 cents per subscriber for each network station. The carriage of network stations, however, was limited to "unserved households" [3] in so-called "white areas" where the home subscriber could not receive over the air the signal of a station carrying that network's programming, or had not recently received such a signal via cable television.

The statute provided for two methods of setting royalty rates in the final two years of the license, 1993–94. The first was by negotiation toward one or more voluntary agreements among carriers, distributors [4] and copyright owners beginning no later than July of 1991. Parties not reaching voluntary agreement were to be subject to the compulsory arbitration represented by this proceeding. 17 U.S.C. 119(c)(2) and (3). Congress made it clear, however, that voluntary agreement "at any time" could replace or supersede the arbitration process or results.[5]

Arbitration is to be guided by seven factors set forth at 17 U.S.C. 119(c)(3)(D):

- The approximate average cost to a cable system for the right to secondarily transmit to the public a primary transmission made by a broadcast station.
- The fee established under any voluntary agreement.
- The last fee proposed by the parties prior to arbitration.
- Maximizing the availability of creative works to the public.
- Affording the copyright owner a fair return and the copyright user a fair income under existing economic conditions.
- The relative roles of the copyright owner and user with respect to creative contribution, technological contribution, capital investment, cost, risk, and opening of new markets for creative expression and media for their communication.
- Minimizing any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

Two of these seven criteria are not disputed as facts here. First, there were no voluntary agreements. (Hardy, Direct Test., 41; Tr. 53) Second, the last offer of the satellite carriers was 9.65 cents per subscriber per month for each superstation and 2.41 cents for each network station. The copyright owners last offered 25 cents per subscriber per month for each signal, without differentiating superstations from network stations. (Tr. 413)

The Panel has considered these last offers in reaching its determination. We believe the offers to be the beginning of a free market process rather than an approximation of its working, as no substantial negotiation took place. (Tr. 408–09)

Each of the other five criteria was disputed by the two sides in both fact and law. We discuss their contentions and our conclusions in order below.

Approximate Average Cost to Cable

1. Superstations

The SHVA requires this Panel to consider "the approximate average cost to a cable system for the right to secondarily transmit to the public a primary transmission made by a broadcast station, * * *" 17 U.S.C. 119(c)(3)(D).

The approximate average cost to a cable system of the statutory retransmission license for superstations was the subject of considerable testimony and argument. Each side presented an experienced witness, and each witness presented calculations supporting his view of the average cable cost. The satellite carriers sponsored the testimony of G. Todd Hardy, an attorney and former executive for Group W Cable, Inc., Millicom Incorporated, and PrimeTime 24 Joint Venture, a satellite carrier. (Hardy Direct Test., Exh. A) The copyright owners presented Allen R. Cooper, Vice President, Technology Evaluation and Planning of the Motion Picture Association of America, Inc. (Cooper Direct Test., 2; Tr. 165)

The two witnesses presented calculations of average cable cost which used the same arithmetic formula. Each started with cable royalties for a particular period of time and divided that sum by the number of subscribers to cable service. This result was divided again by the average distant signal equivalent (DSE) shown on the Cable Data Corporation compilation of the semi-annual Statements of Account filed by cable systems.[6] The figure obtained after dividing by average DSE was divided again by six, representing the months in the reporting period, to produce the final rate. The panel accepts this formula for determining average cable royalty cost per subscriber per month.

The Panel also accepts the Cable Data Corporation reports as accurately representing categories of cable systems and their compulsory license fees. This data was used by both parties as the basis for their calculations, with the differences discussed below. *See, e.g.*, Copyright Owners Exh. 1 and Satellite Carriers Exh. D. Finally, both parties used the average DSEs from the Statements of Account of Form 3 carriers.

[1] The terms "superstation" and "network station," as well as other pertinent terms, are defined at 17 U.S.C. 119(d). The term "independent station" is used interchangeably with superstation in this Report.

[2] The participating carriers are Eastern Microwave, Inc.; Netlink USA; Primestar Partners L.P.; Primetime 24; Southern Satellite Systems, Inc.; United Video, Inc. (Superstar Connection). The copyright owners are Program Suppliers (such as movie studios), Major League Baseball, National Basketball Association, National Hockey League, National Collegiate Athletic Association, Broadcaster Claimants, the Networks (ABC, CBS, NBC), Public Broadcasting Service, American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.

[3] 17 U.S.C. 119(d)(10).

[4] Certain distributors represented by the National Rural Telecommunications Cooperative negotiated separately from the satellite carriers, but for purposes of the arbitration decided to align themselves with the position of the carriers. Letter from John B. Richards to Virginia Carson, January 31, 1992.

[5] H.Rept. 100–887, Committee on the Judiciary, 100th Cong., 2d Sess., August 18, 1988, 23.

[6] The DSE is a composite of (a) distant independent signals and (b) distant network signals (including noncommercial educational stations) which are assessed one-quarter of the royalty assigned a distant independent. 17 U.S.C. 111(f).

because this is the only calculation of DSEs available. Form 1 and Form 2 cable systems do not report stations as distant signals or DSEs. (Tr.163) The Panel adopts the DSE factor from Form 3 Statements of Account as the only reliable factor combining distant independent and network signals.

In calculating the average cost to cable systems for retransmitting broadcast signals, the witnesses differed in three major respects: (1) Revenues of Form 3 cable systems v. revenues of all cable systems; (2) the number of subscribers reported by Form 3 systems v. an estimate of all cable subscribers obtained from Nielsen audience surveys; and (3) the use of 1989 data, which contain a surcharge meant to compensate copyright owners for loss of syndicated exclusivity ("syndex") rights, v. 1990 data, which contain only a minimal syndex surcharge. *See e.g.*, Tr. 179–60. These points of difference will be addressed in turn.

The Universe of Cable Systems

The satellite carriers urge us to calculate the average cable cost using data from all cable systems. This data would include those small cable systems which report on Form 1 and Form 2 as well as the large systems from Form 3. The Form 1 cable systems have semiannual revenues less than $88,000, and the Form 2 cable systems have semiannual revenues of $292,000 or less. (Tr.182; Sat. Car. Br. at 12, note 5).[7] These systems pay modest, fixed statutory fees every six months, regardless of the number or composition (independent or network) of distant signals they import. (Tr. 163) The parties agree that Congress intended to spare small cable systems the administrative burden of complex filings and the economic burden of substantial fees. (Tr. 175, 322) In 1989, the Form 1 and 2 cable systems represented roughly 20% of cable subscribers and 2% of total cable compulsory license payments. (Tr. 320–21) *See also*, Copyright Owners Exh. 1, the Cable Data reports.

The satellite carriers believe that Congress consciously included (or failed to exclude) the small cable systems in the statutory phrase "approximate average cost to a cable system." The carriers further believe that Congress meant to include the small systems because it was setting royalty rates for satellite service in primarily rural areas where these small systems also operate. (Tr. 321–22) The carriers urge that Congress would have specified the use of Form 3 cable systems, either in the statute or in the legislative history, had Congress meant that only these large systems were to be the basis for comparison between cable and satellite services. *Id.*, Sat. Br. at 13–14. Parenthetically, the carriers also note that their calculation of average cable cost using 1988 data (which did not become available until mid-1989) would produce a figure close to the initial 12-cent rate which Congress prescribed. (Tr. 322, Car. Exh. K).

In contrast, the copyright owners present testimony that the 12-cent and 3-cent rates prescribed by Congress were derived from calculations based on Form 3 cable systems only. They testified the statutory rates came from negotiations conducted in 1986 and 1987 among the program suppliers, the cable systems and the Copyright Office. These negotiations attempted to simplify the cable royalty structure into a per subscriber rate. (Tr. 52) According to witness Cooper, the actual numbers were based on Form 3 data from 1984 and were projected to 1987. Witness Cooper recalls that the same numbers were adopted without change in the SHVA in 1988; our record shows no basis for a contrary conclusion. (Tr. 149–50, Owners Exh.11, Attachment 5)

The inclusion of Form 1 and 2 systems, the owners argue further, would distort the average cost calculation substantially, because only the Form 3 royalties vary by number and composition of distant signals imported. (Tr. 161) Finally, the owners argue the satellite carriers have semi-annual revenues which would place them in the Form 3 category were they to file as cable systems. Certain carriers did file copyright reports under the Form 3 rates before the passage of the SHVA. (Hardy Direct Test. at 33; see also, Tr. 465, 466) Copyright Owners Exhibit 8 shows further that even the smallest of the satellite carriers, Primestar Partners, serves 13,213 subscribers for eight signals each, well above the number of subscribers served by Form 2 cable systems. Each of the remaining carriers serves subscribers totaling also 200,000 or more.

The Panel concludes that the Form 3 data is the appropriate basis for calculating average cable cost. We believe that Congress accepted the estimate of average cable cost from the Form 3 data as reasonable information developed by negotiations among the relevant parties and the Copyright Office. (Tr. 364) According to our record, the 12-cent and 3-cent figures were the only rates considered by Congress prior to the passage of section 119. (Tr. 328) Further, the Form 3 reports are the only reports which vary by number and composition of distant signals, giving the only basis for derivation of a comparable satellite royalty. We further agree that the satellite carriers have revenues which would place them in the Form 3 category. Our calculation of average cable cost therefore uses the Form 3 royalties as the starting point. In contrast, the carrier calculation of a 12-cent rate using 1988 data is better seen as *post hoc* and fortuitous.

Number of Subscribers

The parties differ on the next component of the calculation, the number of subscribers by which the royalties are divided. The satellite carriers urge us to use a number which estimates the total number of households subscribing to cable. The carriers assert that the Form 3 subscriber numbers are "indisputably flawed," because a multiple dwelling unit (MDU) such as a large apartment complex can be counted as one subscriber. Sat. Br. at 19. By holding down the number of subscribers, the Form 3 reports would artificially drive up the average royalty per subscriber. (Tr. 318–17, Sat. Br. 18–20)

The owners, in contrast, urge us to use the number of subscribers on the Form 3 reports as stated. The owners argue that the number of subscribers estimated by Nielsen is only an extrapolation of audience surveys for which there is no verification. The Statements of Account, by contrast, are sworn statements which are required by law to be true and correct. (Tr. 397–98) Thus in this view, the average derived from the Form 3 royalties and subscribers is closer to the actual cable experience than the audience estimates of Nielsen, which can include cable pirates as well as paying households. (Tr. 164, Owners Br. at 35)

The Panel adopts the Form 3 subscribers for our calculation of average cost. We believe that the Nielsen estimates are not reliable enough to replace the sworn statements of the cable systems. Furthermore, these estimates are of all cable subscribers, whereas we have indicated Form 3 subscribers to be the appropriate figure. We further note that the affidavit of Thomas Larson, President of Cable Data Corporation, does not quantify the amount of undercounting he believes to be included on the Form 3 reports. (Carriers Exh. H) In the absence of a reliable quantification of the number of subscribers not accounted for on the Form 3 reports, the Panel adopts the Form 3 subscriber numbers.

Syndicated Exclusivity

The copyright owners raise an issue stemming from the fact that they cannot guarantee exclusivity of programming to, and thus command exclusivity-based prices from, local television stations in markets where satellite carriers provide distant signals. This loss of exclusivity for syndicated programming is the most complicated issue with regard to approximate average cable cost, and the issue with the most financial impact. The parties are agreed on the background of this issue which we recap only briefly.

When the Copyright Act of 1976 established the cable compulsory license, the cable systems operated under FCC rules protecting syndicated exclusivity. The FCC allowed local television stations to protect the exclusive rights to show a particular program by requiring the cable systems to black out that program from any distant signal brought into the market. Local network stations were protected by a separate set of network non-duplication rules.

In 1980, the FCC determined that the syndicated exclusivity rules no longer served the public interest and repealed them. Report and Order, Docket Nos. 20988 and 21284, 79 F.C.C. 2d 663 (1980). The Tribunal then placed a surcharge on Form 3 cable systems to compensate the owners of broadcast programming for the loss of their ability to sell the programs exclusively in a given market. Adjustment of the Royalty Rate for Cable Systems, 47 FR 52146 (Nov. 19, 1982). The syndicated exclusivity surcharge amounted to roughly 20% of the cable royalties for Form 3 systems. (TR. 307; Panel Exh. 1).

In 1988, the year Congress passed the SHVA, the FCC reinstated syndicated exclusivity and adopted a new set of blackout rules, effective in 1990. Report and Order, Gen. Docket No. 87–24, 3 F.C.C. Rcd 2711 (1988). The program owners and

[7] These revenues would correspond to approximately 5,000 subscribers or fewer, calculated at $10 per month for basic service.

independent stations argued forcefully before Congress that syndicated exclusivity should also be imposed on satellite carriers. Congress directed the FCC to impose exclusivity on satellite services if it were technically feasible.[8] After an inquiry into the mechanics of blocking out satellite signals to the dishes, the FCC determined that syndicated exclusivity could not feasibly be imposed before the SHVA expires in 1994. On that ground, the FCC declined to impose syndicated exclusivity on satellite carriers. Report and Order, Gen. Docket No. 89-89, 6 F.C.C. Rcd 725 (1991).

The copyright owners urge us to implement a syndicated exclusivity surcharge similar to the one placed on cable systems by the Tribunal from 1982 through 1989. The owners' proposal would place a surcharge on satellite carriers by using the 1989 royalty data as the base for our calculation of average cable rates. The copyright owners further argue that they are entitled to compensation for each use of their programming, especially where the FCC has not afforded blackout protection for programming sold on an exclusive basis. Owners Br. at 12–13.

The satellite carriers urge the converse, that a syndicated exclusivity surcharge should not be imposed since the cable systems do not pay one. (Tr. 308) Indeed, the carriers argue that they are at a competitive disadvantage now, because cable royalty rates have declined with the repeal of syndex surcharges while satellite rates stayed the same. The satellite carriers further argue that their services generally are provided in areas which lack off-air television reception.[9] Normally no local station would have purchased the right to show programming exclusively in these rural markets. (Tr. 310, 332) In many of these areas, moreover, the FCC rules had exemptions which would have relieved the cable systems from the black-out requirements. (Tr. 309, 329) Finally, the carriers argue, three of the most popular independent stations—WTBS, WGN and WOR—have arranged for "syndex-proof" feeds which they supply to cable systems and home dish owners. (Tr. 309; see also, Tr. 45)

The Panel has concluded that Congress meant for syndicated exclusivity to apply to the satellite carriage of broadcast signals if technically feasible. This was the instruction embodied at 47 U.S.C. 712. As satellite service grows, moreover, we believe that the signals may compete to a greater extent with those of local stations purchasing programs on an exclusive basis. (Tr. 285–87) Thus the copyright owners have lost the ability to sell exclusive rights to programming, and we believe some surcharge to compensate for this loss is in order. We therefore base our calculation of average cable cost on the data from 1989.

Having concluded that a syndex surcharge should be applied to satellite signals, we further conclude that the surcharge should only apply to those signals which have not eliminated any syndex conflicts. For those signals which comply with syndex requirements, we do not believe a surcharge is necessary or appropriate.

Thus we provide below our rates based on 1989 data and the other factors set forth earlier—including Form 3 data with its number of subscribers—for independent signals which have not cleared all of their programming for syndex purposes. A second, discounted rate is provided for any superstation signals which have eliminated all syndex conflicts.[10]

If the carriers wish to take advantage of the discounted rate, we will require an affidavit with each semi-annual filing. The affidavit will affirm that the signals to which the discounted rate was applied have carried no programming which would be subject to claims of cable syndicated exclusivity during the six-month period covered.

A number of witnesses stressed their belief that Congress meant this arbitration hearing to be part of the transition to a free marketplace for negotiation of copyright royalties. The Panel believes that by encouraging the provision of satellite feeds which are cleansed of any syndex conflicts, a step toward a free marketplace (and parity with cable systems) has been taken. In any event, the Panel believes that syndex surcharges must take the place of the blackout protection which carriers cannot now provide. Conversely, the charges are not required for those signals which by voluntary action have avoided any conflict with the syndex rules.

Summary. The Panel calculates the approximate average cost of retransmission royalties to cable systems according to the data on Form 3, both as to royalties and number of subscribers, and uses data for the year 1989. The result comes to 16 cents per signal per subscriber, with calculations as follows:

1989–2 Cable Data Corporation Report.

Form 3 Royalties: $101,266,449
  divided by
Form 3 Subscribers: 40,660,045

$2.49 per subscriber
  divided by
Form 3 DSE: 2.644

94.1 cents
  divided by six months

15.7 cents per subscriber per month (rounded to 16 cents) Congressional Budget Office ("CBO") inflation estimates of 3.3% for 1992 and 3.6% for 1993. Only half of the latter rate, or 1.8%, is taken into account, to reflect inflation through mid-1993. The copyright owners maintain that this is a conservative approach, since cable subscriber rates for basic service may well exceed inflation, with a corresponding effect upon cable compulsory license fees.

The satellite carriers oppose any upward adjustment. They argue that reregulation of basic cable fees by FCC decision [11] or proposed legislation (S.12) may reverse the trend of recent years when cable rates rose substantially. They also suggest that the "re-tiering" of basic services by cable operators to remove them from the scope of rate regulation will keep cable compulsory license fees down. And they point to the fact that fees in recent years have leveled off, despite the growth of basic cable revenues. (Brief, 11-12)

We have concluded that an inflation adjustment is appropriate, but one which increases the cable royalty estimate to 17.5 cents, rather than the higher figure proposed by the copyright owners. We have arrived at this figure by eliminating any adjustment for the year 1990, when cable royalties—net of syndex surcharges—were essentially at the 1989 level.[12]

Given that the rates fixed in this proceeding will be in effect through 1994, we cannot assume with the satellite carriers that basic cable rates will not increase at least at the relatively moderate rates of inflation we have taken into account. Past history, consumer demand for cable programming and the market position of the cable industry all militate against such a conclusion.

The 1989 calculation is adjusted by the inflation and other factors discussed below to derive a final rate for retransmission of independent stations. The rate for network stations is also separately discussed below.

For those independent stations which avoid syndex conflicts, the panel provides a discounted rate of 20% below the independent station rate. The 20% discount approximates the historical percentage that syndex comprised of total fees.

Adjustment for Inflation

The preceding discussion has focused on determined the actual level of cable compulsory license fees for 1989, the latest year is which syndex surcharges applied. However, the rates fixed in this proceeding will not go into effect until January of 1993, and will continue to apply to satellite carriage of broadcast stations through December of 1994.

We believe it our responsibility to make a reasonable estimate of the level of cable fees in the 1993–94 time frame. The statutory mandate to consider the "approximate

[8] 47 U.S.C. 712; *see also*, Hearings, H.R. 2848, Satellite Home Viewer Copyright Act, Subcommittee on Courts, Committee on the Judiciary, November 19, 1987 and January 27, 1988, 294.

[9] Our record did not provide information as to the distribution of HSD subscribers between rural and urban or suburban areas.

[10] For purposes of this determination, a satellite retransmission of a broadcast signal shall be deemed "syndex-proof" if, during any semi-annual reporting period as fixed by section 119(b), the retransmission does not include any program which—if delivered by a cable system to a cable subscriber at the same point of reception as the HSD subscriber—would be subject to the syndicated exclusivity rules of the Federal Communications Commission.

[11] *Reexamination of the Effective Competition Standard*, 6 FCC Rcd 4545 (1991).

[12] For 3 cable royalties for the full years 1989 and 1990, after deducting the syndex adjustment which was virtually eliminated in 1990, were $156,475,491 and $158,692,570, respectively.

average cost to a cable system" of secondary transmission rights fairly requires matching the rate comparison to the approximate time period. Otherwise the Congressional purpose of achieving a measure of rate parity between the two media would not be realized."

This conclusion is necessitated by the difference in structure of the cable and HSD retransmission fees. The cable fee, expressed as a percentage of operator gross receipts, has a built-in adjustment mechanism, allowing fees to increase (or decrease) along with revenues. HSD fees, expressed as stated dollar amounts, will not, without adjustment, keep pace with the rates of the cable industry.

The copyright owners would adjust the 1989 16-cent cable superstation rate to 18.5 cents for 1993. This figure is derived by applying actual U.S. Bureau of Labor Statistics ("BLS") inflation rates of 5.4% and 4.2% for 1990 and 1991, and

We also know that retiering would apply to only a portion of cable subscribers; and that, however effective the practice may be in reducing the impact of basic rate reregulation, it would not have a concomitant effect on cable compulsory royalties in view of the broad definition of "gross receipts" in section 111 as construed by the Copyright Office and the courts.[13]

Accordingly, we calculate the inflation adjustment in the following manner:

1991 Inflation Rate: 4.2% (BLS)	
$0.16 × 1.042	$0.1670
1992 Inflation Rate: 3.3% (CBO)	
$0.167 × 1.033	$0.1725
1993 Inflation Rate: 3.6% (CBO)/2	
$0.1725 × 1.018	$0.1750

We are aware that there is always some risk in estimating future rates. Indeed, the initial 12-cent fee set in section 119 for superstation carriage—apparently based on projections used in copyright owner-cable industry negotiations—nevertheless fell short of actual cable rates in the 1989–92 period by approximately 4 cents, or more than 30% (Cooper, Direct Test., 3) We believe that our projection of an increase of 1.5 cents (17.5 minus 16) on a larger base is not likely to lead to a windfall for either of the sides, and is consistent with our mandate, under section 119(c)(2)(D), to consider approximate average cable costs for the 1993–1994 license period.

Weighing the Additional Criteria

The carriers testified that the fourth, fifth, sixth and seventh criteria in the statutory order of listing were to be considered only *after* the primary factor—approximate average cost to cable—had been determined. Average cable cost should be the "presumptive" HSD 1993–94 royalty rate. Unless the rate suggested by that initial determination would be inconsistent with the four objectives, or would "clearly frustrate" their achievement, the Panel should adopt it. (Hardy, Direct Test., 49)

By contrast, the copyright owners saw the four objectives as central to the Panel's task of establishing a new royalty rate more nearly reflecting "marketplace value" of the retransmitted broadcast station signals. (Valenti, Direct Test., 4–6) The final four criteria in the statutory order were said to be synonymous with "market considerations." (Kryle, Tr. 235–38) For the carriers, however, Congress thought of market value as a function of voluntary negotiation and not something that could or should be established by the Panel. (Hardy, Tr. 341–43.)

Both sides have argued ably these points of law. The Panel concludes, however, that Congress meant for us to consider approximate average cable cost and the four additional factors coequally. The language of section 119(c)(3)(D) treats these criteria as conjunctive and coordinate. We find no basis there or in the legislative history to consider one factor as primary in relation to the others.

The carriers appear to suggest that the order of listing in the statute gives primacy to the criterion of approximate average cable cost. (Brief, 4) We do not believe this to be Congress' intent, any more than we believe—by reference to the fifth criterion in section 119(c)(3)(D)—that "fair return" to the copyright owner necessarily is more important than "fair income" to the user. Because the law itself seems clear, we are not convinced legislative history must be examined to interpret the statute.

To the extent we do so, at the invitation of the carriers (Brief, 5–6), the cited House Judiciary Report specifies that approximating the satellite carrier royalty rate to the rate paid by cable systems is based on the two transmission agents' engagement in "the same or similar activities." Because the operations of satellite carriers and cable systems show practical dissimilarities, we have differentiated their royalty rates.[14]

Creative Works: Availability and Fair Return

The Panel believes it reasonable to assume that creative works will be made available if they earn a fair return in the marketplace. Similarly, commercial exploitation of the works depends on users' expectations of fair income.

Owner Testimony

The copyright owners' principal evidence on market value of programming comparable to that carried on distant broadcast television station signals is found in the testimony of witnesses Silberman and Cooper. Because the distant signals themselves, whether transmitted secondarily by satellite carriers or cable systems, are subject to compulsory copyright license, the comparison of market prices cannot be direct.

Accordingly, Dr. Silberman began by analogizing distant signal programming to that found on a composite of four programming services, typically originating on cable systems rather than broadcast stations and thus not subject to compulsory licensing. He testified as to the "top of the rate card" prices paid by cable operators for these services, and came up with a composite rate of 27.9 cents per subscriber per month after weighting the prices by the numbers of subscribers to each service. Since the prices are said to include a cost of delivery to the cable operator's headend, the witness subtracted from the composite rate a satellite carrier's cost of transmission he stated could be generously estimated at one cent. (Silberman, Direct Test., 5–6 and Exh. 4)

Dr. Silberman acknowledged that the program services he used for his composite channel differ from retransmitted broadcast signals in the ability of the cable operator to sell advertising time on the former but not on the latter. He said that this would "increase slightly" the value of the program services (*Id.*, 7), but on Panel examination could not quantify the amount more closely than a 1-to-4 cent range. (Tr. 83)[14]

In another portion of his testimony, Dr. Silberman took note of a price of about 67 cents per signal per subscriber charged to a distributor, NRTC, by certain satellite carriers. He observed that this price was far above the 12 cents paid by the carriers under compulsory license. (Silberman, Direct Test., 9–10) On cross-examination, the witness generally claimed unfamiliarity with the special costs faced by satellite carriers to deliver signals, but stated repeatedly his opinion that if the carriers could charge distributors 67 cents, they could afford to pay 27 cents for the rights to programming and still have "40 cents to play with" in covering other costs. (Tr. 101)

In a third approach to market valuation of distant broadcast signals, Dr. Silberman started from what he said was copyright owner witness Allen Cooper's 18-cent value for each of three superstations in 1989. Allowing for inflation and other upward pressures, he said the value would rise to 21 cents by 1993. To that was added a cost of satellite carriage estimated at four to 10 cents per signal per subscriber. Choosing a mid-range number of six cents for transport, Dr. Silberman concluded that the 27-cent result comported well with his initial approach based on a composite of four cable program services. (Tr. 130–31) Under Panel questioning, however, the witness said that his calculation represented only a "best guess" and that "if we're a few pennies more or a few pennies less in 1993, I would most certainly not be surprised by that." (Tr. 133)

Copyright owner witness Cooper gave evidence on the prices carriers and distributors charged HSD users for independent and network signals. He testified that the average rate per month per signal—combining independent and network stations—was $1.09, with 99 cents being "the most common rate." (Cooper, Direct Test., 4, and Tr. 151–55). The witness noted that these prices were eight or nine times the 12-cent license fee for superstations.

[13] *Cablevision Sys. Dev. v. Motion Picture Ass'n*, 836 F.2d 599 (D.C. Cir 1988); *See also*, 37 C.F.R. § 201.17(b)(1). *Cf.* H.R. Rept. No. 1478, 94th Cong., 2d Sess. 175 (1976).

[14] See, for example, the consideration of the "syndex surcharge," *supra*, and network station rates, *infra*.

[14] In a later Information Filing (Exh. 11, Attachment 1) by the copyright owners, treated by consent as "argument of counsel," (Tr 536–39) a figure of 2.8 cents was estimated as the net profit per signal per subscriber per month. In the third paragraph of their Information Filing (Exh. I), also consented to as argument of counsel, the satellite carriers estimated the number to be 7.1 cents per subscriber per signal.

Another copyright owner witness, Edwin Desser, spoke to the issue of market value of sports programming comparable to that carried by broadcast distant signals. In three examples, the values ranged from 10 cents to 62 cents per subscriber per month. (Desser, Direct Test., 2–3) Under Panel examination, the witness said that the total market value of a distant station carried chiefly for its sports appeal would at least equal—and probably exceed—the value of the sports programming. (Tr. 204) On cross-examination, Mr. Desser agreed generally that regional sports networks such as those used in his examples were permitted to sell advertising time associated with the sports events. (Tr. 214)

Carrier Testimony

Satellite carrier witness G. Todd Hardy testified that carrier-proposed royalty rates of 9.8 cents and 2.45 cents for independent and network stations, respectively, would be consistent with the objectives of maximizing availability of creative works and assuring copyright owners a fair return. (Hardy, Direct Test., 52–55) [16]

Hardy stated that by comparison with 90 million and 50 million households served by broadcast and cable television, the 600,000 or so HSD users are too small a group to have any significant effect on creative output. On the other hand, he said, setting royalty rates for satellite carriers too high could impede distribution of creative works to viewers who cannot receive them except by HSD service.

Just as the HSD industry is too small to affect creative output, so it is unable—by itself—to guarantee a fair return to program copyright owners. It contributes to that return, however, by extending the reach of networks and stations carrying advertising. According to Hardy, "this presumably benefits the retransmitted broadcast stations, and theoretically allows the copyright owners to secure higher fees for their initial licensing to those stations." (*Id.*, 54) The witness also suggested that the relative stability of HSD subscription rates over recent years means that those prices are at or near their limit. This, he said, would make it more difficult for carriers to absorb royalty rate increases.

Panel Discussion

The owners and carriers are completely at odds on the pertinence of "market value" to considerations of the effect of fair return and fair income on the availability of creative works. The owners consider the concept central to our royalty rate determination, and have supplied three different approaches to a market analogy for the value of retransmitted broadcast signals. Believing such constructions beyond the scope of our assignment, the carriers have declined to offer marketplace comparisons beyond the unrealized outcomes of negotiations between the two sides. (Hardy, Direct Test., 67–72; Brief, 30–36)

We agree with the owners that assuring the availability of creative works at a fair return to the copyright holder and a fair income to the user of rights involves marketplace considerations. However, we are not completely satisfied with any of the owner's three approaches to a market value for distant broadcast signals. Accordingly, the royalty rate we determine is substantially below the 27 cents proposed.

We find record support for each of the carriers' challenges to Dr. Silberman's testimony. (Brief, 43–49). His choice of four cable programming services as the building blocks for a composite channel was not the only possible selection, and in the end could not be proven as a close analogue to any of the distant signals in question. (Tr. 79–81) Use of "top of the rate card" prices was, by the witness' own admission, a doubtful choice (Direct Test., 6; at n. 6; *see also* Tr 103). His testimony on the value to the cable operator of insertable advertising was imprecise and controverted. (Tr 83, 118; Carrier Information Filing, Attachment A) Rather than discuss in any detail possible differences in operating cost between cable operators and satellite carriers—differences which might affect the two industries' perceptions of program value—Dr. Silberman tended to rely chiefly on an asserted 40-cent difference between his composite price and the price charged one distributor by some satellite carriers. (Tr 100–110)

These difficulties in constructing a hypothetical free market for distant broadcast signals are not new. Ten years ago, the Copyright Royalty Tribunal examined at length similar proposals by owners attempting to value distant signals newly eligible for cable compulsory license. [17]

Dr. Silberman's second approach, supplemented by Mr. Cooper, is also less than convincing. Without a more detailed examination of the particular transmission and other operating costs of satellite carriers, especially in relation to such costs for cable operators, the Panel is unable to discern the significance to be given the prices charged to distributors or HSD users for various broadcast signal packages. Numbers ranging from 67 through 99 cents to $1.09 per subscriber might be meaningful in analyzing the satellite carrier industry's ability to absorb royalty rate increases, and to that extent will be discussed below. By themselves, however, these gross revenue figures cannot speak persuasively to the point of fair income to the satellite carrier as a user of creative works. [18]

Finally, we cannot credit a third approach by which Dr. Silberman, again assisted by Mr. Cooper, took a regulated rate paid for certain superstations under cable compulsory license and added to these a presumably market-based charge paid by cable operators to satellite carriers for the importation of these signals. (Tr 129–31) The witness chose a wide range for transport cost of 4 to 10 cents, and gave no particular reason for choosing 6 cents as the number to insert in his calculation. By Dr. Silberman's own implication in testimony (Tr 133), this hybrid of compulsory and voluntary rates seems less satisfying than the first approach.

Perhaps the most readily quantifiable of the elements in Dr. Silberman's initial composite of four cable programming services were the tables of license fees per subscriber per month for those services and similar non-broadcast offerings. (Owners Exh. 4) Despite the witness' demurrer (Direct Test., 6, n.5; Tr 93), the Panel would be more inclined to look at average actual fees rather than top-of-card rates. For the sake of argument, if a value of insertable advertising midway between the 2.8 cents per subscriber of Dr. Silberman and the 7.1 cents of the carriers [19]—say 5 cents—and this is then subtracted from the 23-cent average calculated by Silberman (Tr. 93), the result comes close to the superstation rate we have determined by other means.

The Panel has acted on its belief that marketplace considerations are relevant by examining the only proposals in hand—those of the copyright owners. Given the identified weaknesses in each of the three approaches taken by owner witnesses, we think it reasonable that the rate we have determined falls below the rate requested by the owners. We do not find in the record sufficiently detailed evidence as to the revenues, costs and profits of the various businesses on both sides to cast doubt on the capability of our rate to achieve the objectives of making creative works available with a fair return to the copyright owners.

The carriers, by choice, did not supply market analogies and calculations. Nevertheless, we must do the best we can, on this record as given, to assure that the objective of fair income to the user is met. We have said earlier that the owners' mere recitations of per-subscriber prices to distributors and HSD owners cannot, by themselves, establish market value absent a better knowledge of satellite carrier costs.

The carriers, on the other hand, chose not to supply those costs, which were peculiarly known to them. They put forth the relative stability of their retail prices (Direct Test., Exh. B) as an implication that market ceilings had been reached, such that raising royalty rates would unfairly reduce carrier income. (Direct Test., 55–58). Another inference is possible: That initial rates turned out to be ample enough that increases have not been required. (Tr 357–58) When this inference is coupled with absence of detailed carrier response to the gap between owner-proposed

[16] In direct testimony at 54, the carrier witness also imputed significance to the decision of copyright owners to forgo certain 1990 cable royalty rate adjustments, which he said implied that the existing cable rate provided the owners a fair return. The Panel defers to the valuable principle that settlements of litigation are to be encouraged and thus not held against any party in the future. Accordingly, we have given no consideration to testimony about the agreement between cable operators and copyright owners not to pursue 1990 cable royalty rate adjustments.

[17] *Adjustment of the Royalty Rate for Cable Systems*, Docket No. CRT 81–2, 47 FR 52146 (Nov. 19, 1982), see text between notes 40 and 53; *aff'd sub nom. Nat. Cable T.V. v. Copyright Royalty Tribunal*, 724 F.2d 176 (1983). The Tribunal's 1982 analysis included regional sports networks, which we have considered here as well in connection with Mr. Desser's testimony.

[18] On the other side of the coin, neither can we give much if any weight to the undocumented assertion of carrier witness Hardy that a carrier with which he formerly was affiliated had not made a profit in five years. (Tr 272, 289, 489)

[19] To repeat, the Panel is treating these numbers, by consent, as argument of counsel on both sides. Note 15, *supra*.

royalty rates of 27 cents and 67-cent-to-$1.09 prices to distributors and HSD users, the Panel believes that its rate will not fail to provide fair income to the satellite carriers.

Relative Contributions and Risks

We are impressed by the testimony of Jack Valenti for the owners and G. Todd Hardy for the carriers that both sides have made great creative and technical contributions to the supply and distribution of a great variety of video programming to HSD users. It appears that each side needs and values the achievements of the other in opening new markets and in developing the media for their communication.

The appeal of the owners' works is amply shown by their popularity both at home and abroad. The technical ingenuity of the HSD industry is demonstrated in many ways, but perhaps most significantly by (1) the declining size and price—as well as the flexible, multi-satellite orientation—of home terminals; and (2) the development of a descrambling authorization center which, we understand, will be upgraded in the near future in ways that will benefit owners, carriers and users. Carrier witness Hardy testified that, by making HSD signals more piracy-proof, the new technology might increase subscribers by as much as 100% (Hardy, Direct Test., 55–57; Tr 286–87)

In its full measure, the statute bids us consider not only creative and technological contributions but also capital investment, cost and risk. While these elements may be larger in the absolute for the owners, we are inclined to agree with witness Hardy that investment, cost and risk have been relatively quite high for satellite carriers and their allied manufacturing and distribution businesses. On balance, we find no reason on this record to conclude that one side's overall contributions, in relation to those of the other, are so much greater as to have independent effect on our rate determination.

Disruptive Impact

Section 119 asks us to consider disruption of both structure and "prevailing practices" in the businesses on both sides. Our examination here necessarily covers much of the same ground as in the previous discussion of creative works made available with fair return and fair income. The Panel has kept the correlations of these factors in mind as it analyzed the criterion of disruptive impact.

Carrier witness Hardy testified that because the HSD industry is so small by comparison with the businesses of the owners and their allies, "it is difficult to imagine any HSD [royalty rate] materially affecting the owners." In contrast, he said, a rate increase of the magnitude proposed by the owners would harm the HSD industry in at least two ways: (1) The carriers would be at a "competitive disadvantage vis-a-vis the cable industry;" and (2) because the HSD market "is already at, or near, its price limit," royalty increases of 100% or more would be a "severe jolt" that could not be absorbed through increased revenues. (Direct Test., 58)

Concerning competitive disadvantage, we believe our calculations and discussion of the principal carrier/cable rate disparities—syndex surcharge and network differential—have been properly sensitive to Congressional concerns. With regard to the more significant of these factors, the syndex surcharge, the satellite carrier pays a higher royalty rate than cable, but is not burdened by the blackout requirements applied to cable operators.

Not only in comparison with cable, but in an absolute sense, we have tried to avoid carrier "rate shock." From the record on the significant differences between the more established HSD business of retransmitting superstations and the newer and shakier undertaking of delivering network signals into severely circumscribed geographic areas, we are concerned that the independent station license fee not be set so high as to be not only injurious in itself but also damaging in its upward effect on the network station rate. (Tr 350–61)

As discussed above, the carriers were quick to point out that owners did not understand HSD industry costs or had erred in trying to estimate them. The carriers, however, chose not to fill in or correct the cost picture in any detail. Based on the record as a whole, we are unable to conclude that the business structure or practices of the carriers in the HSD industry will be disrupted by the relatively small increases in license fees we have determined.

On the owners' side, the direct testimony of witnesses Valenti (5) and Cooper (3) spoke in terms of "subsidies" to and "underpayments" from the carriers. In their view, such transfers are antithetical to fair return on copyright. Mr. Cooper and Dr. Silberman together invited us to infer substantial cushion in carrier prices that could absorb license fee increases of the magnitude proposed.

The owners' evidence, however, did not go so far as to prove that the flow of creative works to HSD users would be disrupted if a 1993–94 royalty rate less than 27 cents per subscriber per signal were adopted. In fact, Mr. Valenti stated simply that neither side should gain "unfair advantage" by the compulsory HSD license, thus implicitly taking the question back to fair return. (Direct Test., 6)

II. Network Stations

Perhaps the most difficult task facing this Panel has been the determination of a reasonable fee for retransmission of network signals. There is a fundamental difference between Sections 111 and 119 in the consideration of copyright protection accorded programs carried on network affiliates. Section 119 and its legislative history do not provide a definitive report of Congress' intentions on this issue. We believe there are at least two ways to view the statutory scheme and its consequences for programs of network affiliates.

Because the two approaches below are a composite of evidence and argument from the copyright owners and the satellite carriers along with the Panel's own development of these positions, for purposes of discussion we choose neutral captions not attaching them to either side.

First Approach

The House Judiciary Committee Report on the 1976 Copyright Act (No. 94–1476, at 90) states as to section 111:

> [T]he Committee has concluded that the copyright liability of cable television systems under the compulsory license should be limited to the retransmission of distant non-network programming.

The Committee explained that liability should not extend to network programming because its retransmission "does not injure the copyright owner." This was so, according to the Report, because: "The copyright owner contracts with the network on the basis of his programming reaching all markets served by the network and is compensated accordingly."

By contrast, in the SHVA Congress expressly included network programming in the new compulsory license. 17 U.S.C. 119(a)(2). The House Judiciary Committee Report on the legislation thus states:

> [T]he bill takes affirmative steps to treat similarly the measure of copyright protection accorded to television programming distributed by national television networks and nonnetwork programming distributed by independent television stations.[20]

This difference in approach is consistent with section 119's limitation of network signal retransmissions to "white areas." As we have seen, the Section 119 compulsory license is expressly confined to secondary transmissions "to persons who reside in unserved households." 17 U.S.C. 119(a)(2)(B) "In essence," as the House Commerce Committee Report states, "the statutory license for network signals applies in areas where the signals cannot be received via rooftop antennas or cable."[21]

The royalty provisions of sections 111 and 119 reflect the differences in their treatment of network programs for purposes of the compulsory license. Section 111(d)(3) expressly provides that cable royalties may be distributed only to an owner of "a non-network television program." The 1976 House Judiciary Committee Report explains that this is "[c]onsistent with the Committee's view that copyright royalty fees should be made [sic] only for the retransmission of distant non-network programming." H.Rept. 94–1476, at 97.

By contrast, section 119(b)(3) states that royalty fees shall be distributed "to those copyright owners whose works were included in a secondary transmission for private home viewing made by a satellite carrier * * *." In a proceeding challenging distribution of HSD copyright royalties to owners of network programs, the Tribunal has ruled that, under the clear language of the above section, "copyright owners of network programs are entitled to participate and prove their entitlement in the distribution of the satellite carrier fund."[22]

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[20] Report No. 100–887 (Part 1), 15.

[21] Report No. 100–887 (Part 2), 14.

[22] *1989 Satellite Carrier Royalty Distribution Proceeding*, 56 FR 20414, 20416 (May 3, 1991) The Tribunal relied upon the plain language of the statute. Finding the Report of the Judiciary Committee, which has jurisdiction over copyright, consistent with this holding, the Tribunal rejected a contrary statement in the House Commerce Committee Report (discussed *infra*.)

In section 111, since network programming (then estimated to represent 75% of a network affiliate's total viewing) was not copyright-protected, Congress assigned those signals a DSE value of only 25%. This effectively resulted in cable systems paying fees for independents and affiliates at a 4 to 1 ratio.

When it came to setting fees for the initial period of the SHVA license, Congress maintained that ratio. The only explanation given by the House Judiciary Committee for the 12-cent and 3-cent rates was: "These fees approximate the same royalty fees paid by cable households for receipt of similar copyrighted signals."[23] While this statement makes evident sense as to independent stations, which are treated similarly under the cable and HSD compulsory licenses, the Judiciary Committee did not explain the initial parity of network rates—given the dissimilarity in the copyright treatment of network programming under the two sections.

The House Commerce Committee, which also reported on the SHVA, did offer an explanation. It quoted the statement in the 1976 House Judiciary Report that "the viewing of non-network programs on network stations is considered to approximate 25 percent." Carrying this logic forward, the Committee concluded that copyright owners of network programs would not be entitled to share in royalties for retransmissions of network signals to "white areas." Report 100-887 (Part 2), 23.

The copyright owners of non-network programming relied on this statement in seeking a Tribunal determination excluding network programming from section 119 royalty distributions. As we have seen, the Tribunal rejected that contention in light of the clear language of the statute.

Accordingly, the copyright owners before this Panel assert that the fee collected for network stations must be the same as that collected for independent stations. (Kryle Test., 1, 3, 6; Brief, 49–52) They view retransmission of network signals into white areas as a new use of their product for which they are entitled to compensation. They argue that any effect on network advertising receipts is irrelevant. What is relevant is that the carriers are profiting from this new mode of commercial exploitation of their copyrighted works. (Tr 232–33)

Second Approach

The same legislative material is susceptible to a second and equally respectable view. That is, section 111 and 119 (as written in 1988) treat network signals alike for purposes of license fee *collection*, but they are different in the matter of fee *distribution*. This latter aspect was what the House Judiciary Report referred to when it spoke of "affirmative steps to treat similarly" network station and independent station programming.

Despite section 119's entitling of network program owners to participate in distributions from the satellite royalty pool, the law as written—for reasons that may not be discernible—does not require a match between fees paid in and funds drawn out. Instead, the carriers assert that Congress deliberately retained the 1976 ratio in 1988 to assure their industry's parity with cable systems for competitive and other reasons. (Brief, 25–30)

Besides their competitive parity argument, the carriers essentially claim that network program owners and the networks themselves are not harmed, but helped, by HSD extension of network signals into unserved areas. They point out that cable operators historically have engaged in such importation, and that Congress in 1988 was aware that satellite carriers and distributors would perform a similar function. Accordingly, the 4:1 ratio was retained. (Hardy Direct Test., 32; Brief 28)

The "white areas" restriction on satellite carrier retransmission of network stations is only briefly described in the House Judiciary Report on the SHVA, but extensively discussed in the Commerce Report. There it is explained as a means of preserving the exclusivity of valuable relationships of networks and their affiliated stations, by precluding satellite carriers from importing network stations into areas already served by a local station carrying that network.[24]

Asserting that the record demonstrates lack of HSD influence on the network advertising market, the carriers suggest:

> Advertisers dealing with the networks doubtlessly assume they are buying into nationwide distribution without even considering the "white area" and HSD issues. Copyright holders presumably make the very same assumption. (Brief, 29)

By extension, this reasoning would explain why on the collection side the Congress in 1988 initially retained the network signal differential, on the ground that carriers should not be paying a second time for network programming.

The Fairness Objectives

Both the first and second approaches are plausible interpretations of a tangled legislative background. We add to them, however, considerations of practicality and equity which preclude our taking either approach to its end, unmodified.

We find, initially, that we are not bound in law to continue the 4:1 ratio in fee collections for independent stations and network stations. As noted elsewhere in this Report, royalty rate parity is only one of several criteria Congress set for our consideration.

However, if under the first approach we were to fix the new ratio at 1:1, carriers would pay 17.5 cents for retransmitting network signals, a rate nearly six times the current fee. If we adopted the second approach, the 4:1 ratio would produce a rate of 4.4 cents. As discussed below, this approach does not conform to present-day estimates of the amount of non-network viewing on network affiliates. To choose between these figures, we look for guidance in the record as to a payment that would be fair in return to the owner, fair in relation to the income of the user, and not disruptive to the business structure or practices of either.

Affording the Copyright Owner a Fair Return. In appraising this factor, a comparison with the return to the copyright owner from HSD distribution of superstations—currently four times the return from network stations—is pertinent. This is especially true since the prices charged by satellite carriers or their distributors to HSD owners for network signals are as high or even higher than the prices charged for superstations. Carrier witness Hardy testified that the price charged in 1992 by PrimeTime 24 for network signals was about $12.50 per year per signal, while the price charged by Superstar Connection for superstation signals was $11.00 per year per signal. (Tr 462–63) Indeed, PrimeTime 24 subscribers who subscribe to only one or two of its three network station signals—primarily because they are not "unserved" with respect to all three networks—pay an undiscounted, three-network price of $37.50 annually.

Actually, it may be that the series and sports programming on network stations, for which large sums are expended by the networks, is of greater value to the HSD subscriber than superstation programming. To the extent that HSD subscribers have program interests similar to those of cable subscribers, a survey at Owner Exh. 9 appears pertinent. Two out of three cable subscribers responded that they would either definitely cancel or consider cancelling their cable subscriptions if network stations were dropped from their cable systems. Kryle, Direct Test., 8.

These considerations support a network station rate at least equal to that charged for independent stations.

Affording the Copyright User a Fair Income. Carrier witness Hardy testified that PrimeTime 24, a company he founded, has not yet shown a profit from its combined activities in five years of operation. He believed the same to be true of Netlink, the other principal carrier of network stations. Despite requests, this testimony was not accompanied by cost data, financial statements or like evidence which could be subjected to meaningful examination.

Nonetheless, we believe that distributing network signals may be less profitable than distributing superstations to the HSD market. This is because even before development of the HSD market, superstation carriers served a large cable market through distribution arrangements with cable operators serving tens of millions of subscribers. The additional revenue derived from extending that distribution to HSD owners, with little incremental expense so far as this record shows, would appear to yield significant incremental profits. By contrast, satellite carriage of network stations is a new business established expressly to serve the HSD market. (Tr 350–61) In addition, the potential HSD market for network stations may not be as great as that for superstations, since it is confined to white areas comprising only 1% of the nation's TV households. (Kryle, Direct Test., 7)

These considerations would lead us to a reduction in the 1993–94 royalty rate for network stations to perhaps 50% of the superstation rate.[25]

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[23] Report No. 100–887 (Part 1), 22.

[24] Report 100–887 (Part 2), 19–20.

[25] We also have given separate attention to the criteria of creative works' availability and relative

Continued

An Alternative Approach

A similar result would follow were we to accept the carriers' view, *inter alia,* that Congress intended no value to be assigned retransmissions of network programs on network stations because of the benefits derived from extension of network advertising to additional viewers.

Evidence supplied by the owners suggests that relative viewing of network and non-network programming on network stations today is closer to 50–50 than 75–25. (Informational Filing, Attachment 4) Applying these numbers would also lead to a network station royalty rate of about half the superstation rate.

Network Station Rate Determination. Based on all the foregoing factors, we would set the network station compulsory license fee for 1993–94 at approximately 8 cents. There remains for us to consider, however, the final criterion of industry disruption.

We are concerned that an immediate increase on this scale might be disruptive to satellite carriage of network signals. Given that the rates fixed by this proceeding will be in effect for only two years, we are setting the rate for that period at 6 cents. This is about 1.5 cents higher than would have resulted under the 4:1 ratio fixed for 1989–92, an increase which we think is not only reasonable under all the circumstances, but also one which the HSD industry can prepare for between now and January of 1993.[24]

Conclusion

For all the reasons discussed above, the Panel determines that the compulsory license fees to be paid in 1993 and 1994 by satellite carriers for the right to transmit secondarily to the public, for private home viewing, primary transmissions of broadcast stations, should be:

• 17.5 cents per subscriber per month for independent stations, also known as superstations;

• 14 cents per subscriber per month for independent stations whose signals are syndex-proof, as defined at note 10; and

• 6 cents per subscriber per month for network stations, including public broadcasting stations.

Pursuant to section 119(c)(3)(C), the Panel determines that the entire cost of this arbitration proceeding should be borne equally by the respective sides, the copyright owners on the one side and the satellite carriers on the other.

Respectfully submitted,

Arbitration Panel

Virginia S. Carson,

Chairperson.

James R. Hobson,

Arbitrator.

David H. Horowitz,

Arbitrator.

March 2, 1992.

Certification of the Record

The Arbitration Panel, by its Chair, certifies the following documents as the Record in CRT Docket No. 91–3–SCRA:

Written Direct Testimony of: Jack Valenti, Fritz Attaway, Allen Cooper, Stephen Silberman, Edwin Desser, Sanford Kryle, received February 10, 1992 as if given orally.

Written Direct Testimony of: G. Todd Hardy, Appendix to Direct Testimony of G. Todd Hardy received February 11, 1992 as if given orally.

Exhibits

Copyright Owners Ex. 1: Cable Data Corporation, reports of cable system copyright royalties, 1986–1989.
Copyright Owners Ex. 2: Satellite Service Ads/"Orbit" Magazine.
Copyright Owners Ex. 3: Program Schedule for November 15, 1991, December 10, 1991, and January 23, 1992 for cable services Arts & Entertainment, WTBS, WGN, TNT, USA, Nickelodeon.
Copyright Owners Ex. 4: Cable TV Programming Report, Paul Kagan Associates, Inc., March 25, 1991.
Copyright Owners Ex. 5: Ads for sporting events on satellite television services.
Copyright Owners Ex. 6: Report, FCC Gen. Docket No. 89–88, Dec. 29, 1989.
Copyright Owners Ex. 7: Notice of Declaratory Ruling, CRT Docket No. 91–1–89SCD, May 3, 1991.
Copyright Owners Ex. 8: Statements of Account, Satellite Carriers, and Fee Generation Report, 1989–91.
Copyright Owners Ex. 9: America's Watching, Public Attitudes Toward Television 1991, Roper Organization.
Copyright Owners Ex. 10: Cable Television Developments, September 1991, National Cable Television Association.
Satellite Carriers Ex. A: Curriculum Vitae, G. Todd Hardy.
Satellite Carriers Ex. B: Satellite Carriers and signals carried.
Satellite Carriers Ex. C: Diagrams, High Density and Low Density Cable Systems.
Satellite Carriers Ex. D: Cable Data Corporation, Cable Systems Royalty Report, 1990.
Satellite Carriers Ex. E: 1990 Cable Compulsory Royalties (calculation).
Satellite Carriers Ex. F: 1990 Cable Compulsory Royalties (calculation).
Satellite Carriers Ex. G: Nielsen estimate of cable subscribers, 1990 by quarter and 1990 average.
Satellite Carriers Ex. H: Declaration of Thomas Larson, President of Cable Data Corporation.
Transcript of Hearing, February 10, 1992.
Transcript of Hearing, February 11, 1992 and Copyright Owners Exhibits 12–13, bound into transcript, Satellite Carriers Exhibits I, J, K, bound into transcript, and Panel Exhibit 1, bound into transcript. (Carrier Ex. I is an Information Filing.)
Copyright Owners Ex. 11: Information Filing, accepted with the exception of the further statement of Stephen Silberman. Mr. Silberman's argument was treated in the Brief of the Copyright Owners as argument of counsel.
Post-Hearing Brief of the Satellite Carriers, February 19, 1992.
Post-Hearing Brief of the Copyright Owners, February 19, 1992.
Transcript of Oral Argument, February 21, 1992.

I certify that the listing above contains the Record on which the Arbitration Panel based its award.

Virginia S. Carson,

Chair.

[FR Doc. 92–10211 Filed 4–30–92; 8:45 am]

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owner/user contributions, but conclude that they would not independently affect the outcome for network station rates.

[24] In theory, we could fix a rate for network signals cleared of syndex conflicts, but given the substantial adjustments already made in the rate for these signals, the absence on this record of any such cleared signals, and the relatively brief period of effectiveness for our determination, we decline to establish a syndex-proof rate for network signals.

particularly where, as in the case, the litigation is quite complex and involves the technically-oriented testimony of numerous witnesses. There are also cost considerations. Broad discovery rules would considerably increase the cost of CARP proceedings, without necessarily producing a corresponding increase in the quality of the evidentiary presentations. The parties may, therefore, as of right only request documents which underlie a witness's factual assertions.

The rules do not, however, prohibit a party, once the CARP has begun, from petitioning the Panel to take discovery on an issue or issues that it believes are critical to the resolution of the proceeding. As noted above, augmentation of the record is the prerogative of the CARP, and the Panel has the discretion to decide whether or not to allow additional discovery beyond that of section 251.45(c)(1). *See* 37 C.F.R. 251.42 (CARP may waive the rules upon a showing of good cause). SBCA complains that the Panel might have reduced the royalty rates based on the issues it raised had it allowed additional discovery. Yet, SBCA never petitioned the Panel to take such discovery. The Panel cannot be faulted for not reopening the record and allowing additional discovery when it was asked to do so. *See National Ass'n of Broadcasters* v. *CRT*, 772 F.2d 922, 936–937 (D.C. Cir. 1985) (claimant failed to petition Tribunal to allow it to adduce additional evidence regarding opposing party's alleged lack of copyright ownership).

The issue remains as to whether the Panel should have reopened the record, on its own motion, and allowed SBCA to take discovery on the issues it rates: i.e. whether it was arbitrary for the Panel not to do so. In the Register's view, the Panel did not act arbitrarily. Regarding the value of retransmission consent negotiations, the Panel found that Ms. McLaughin, and Messrs. Gerbrandt, Shooshan and Harin offered testimony regarding the probative value of retransmission consent negotiations on the fair market value of retransmitted broadcast signals. Panel Report at 34–35. The Panel found this testimony to be unsupportive of the proposition that retransmission consent negotiations affected the fair market value analysis. *Id.* at 35. Because there is record evidence to support the Panel's determination, the Panel did not act arbitrarily.

With regard to the purported added value to broadcast signals by satellite retransmission in digital format, and attractive electronic guides provided the subscribers, the Panel determined that "no quantifiable benefit was identified and no evidence adduced that this benefit would materially affect fair market value * * *." Panel Report at 40. As the Copyright Owners correctly point out, any added value from digital picture quality and electronic guides would occur for both broadcast and cable network programming. Copyright Owners Reply at 25. SBCA could have presented evidence that demonstrated that satellite carriers pay a lower fee for licensing cable networks as a result of digital picture quality and electronic guides provided by the carriers. Such evidence, if it exists, is in the sole possession of the satellite carriers. SBCA presented no such evidence. The Panel, therefore, cannot be faulted from finding no evidence to support added value from these items.

Regarding clearance costs saved by broadcasters and copyright owners from satellite retransmissions, the Panel stated:

> SBCA further argues that in a free market, it would be virtually impossible for satellite carriers to negotiate directly with every copyright owner of every program contained in each day's signal they retransmit. Accordingly, they reason, broadcasters would invariably by compelled by market forces to clear all rights and negotiate with satellite carriers for retransmission of their entire signals. Those costs which the broadcasters would incur in purchasing the clearances are unknown. Hence, SBCA concludes that the section 119 rates should not be raised without considering the broadcasters' cost savings. We tend to agree with both of SBCA's premises but not its conclusion. In a hypothetical free market, it is quite conceivable that the higher the costs broadcasters must pay to clear their signals for DTH distribution, the higher the royalty rates they would charge satellite carriers. Accordingly, the impact of higher clearance costs on the fair market value (based upon a hypothetical free market analysis) could be positive rather than negative. No adjustment to the cable network benchmark is required.

Panel Report at 41.

SBCA contends that Copyright Owners never put on any evidence demonstrating their cost savings, and it should not therefore be presumed that clearance costs would be passed on to satellite carriers. SBCA Petition to Modify at 30. SBCA's argument, however, is one of emphasis rather than evidence. SBCA asked the Panel to quantify what the average cost *might* be, in a *hypothetical market*, for clearance costs, and how satellite carriers and broadcasters *might* allocate such costs. Not surprisingly, SBCA does not indicate what, if any evidence, would conclusively demonstrate what such costs might be, or who might bear them.[19] It is not reversible error for the Panel to reason that in a marketplace which does not exist, clearance costs might have a positive effect on the cable network benchmark, rather than a negative one.[20]

Finally, with regard to the purported increase in advertising revenues and compensation from expanding coverage of broadcast signals by satellite retransmission, the Panel found that it could not quantify any potential reductions of the cable network benchmark. Panel Report at 37. While allowing SBCA expanded discovery on these points might have assisted the Panel in quantifying a downward adjustment to the cable network benchmark, the Register cannot determine anything in the record that compelled it. Furthermore, the Panel did conclude that its choice of the "conservative" PBS/McLaughlin cable network benchmark reflected its inability to quantify any increased advertising revenues that copyright owners might receive from expanded markets through satellite retransmission. *Id.* In the Register's view, the Panel's action was the product of rational decisionmaking.

H. Conclusion

Having fully analyzed the record in this proceeding and considered the contentions of the parties, the Register recommends that the Librarian of Congress adopt the royalty rate, effective January 1, 1998, of 27 cents per subscriber per month for retransmission of any distant superstation and network signals by satellite carriers to subscribers for private home viewing.

In addition, the Register recommends that the Librarian not adopt any royalty fee for the local retransmission of superstation signals, as defined under 17 U.S.C. 119(d)(11), and for the local retransmission of a network signal, as defined under § 119(d)(11), to any subscriber residing in an unserved household, as defined in § 119(d)(10).

Finally, the Register recommends that the petition to modify the Panel's decision filed by EchoStar be dismissed, and the motion of Copyright Owners to dismiss attachment A of SBCA's petition to modify (and the

[19] SBCA does cite a statement of FCC Commissioner Dennis that broadcasters might have to bear these costs. SBCA Petition to Modify at 30 (citing "In re Compulsory Copyright License for Cable Retransmissions," 4 FCC Rcd. 6711 (1989) (Commissioner Dennis, concurring). However, Commissioner Dennis' statement is speculative, describing what might happen to broadcasters "in some cases," 4 FCC Rcd. at 6711, and is far from conclusive evidence.

[20] In fact, the Panel did not make any change to the benchmark for clearance costs.

accompanying argument and discussion) be granted.

Order of the Librarian

Having duly considered the recommendation of the Register of Copyrights regarding the Report of the Copyright Arbitration Royalty Panel in the matter of the adjustment of the royalty rates for the satellite carrier compulsory license, 17 U.S.C. 119, the Librarian of Congress fully endorses and adopts here recommendation to accept the Panel's decision in part and reject it in part. For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing this order, and amending the rules of the Library and the Copyright Office, announcing the new royalty rates for the section 119 compulsory license.

The Librarian is also dismissing the petition to modify filed by EchoStar, and is dismissing the affidavits contained in attachment A of SBCA's petition to modify, and the accompanying discussion and argument.

List of Subjects in 37 CFR Part 258

Copyright, Satellites, Television.

Final Regulation

In consideration of the foregoing, the Library of Congress amends part 258 of 37 CFR as follows:

PART 258—ADJUSTMENT OF ROYALTY FEE FOR SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS

1. The authority citation for part 258 continues to read as follows:

Authority: 17 U.S.C. 702, 802.

2. Section 258.3 is revised to read as follows:

§ 258.3 Royalty fee for secondary transmission of broadcast stations by satellite carriers.

(a) Commencing May 1, 1992, the royalty rate for the secondary transmission of broadcast stations for private home viewing by satellite carriers shall be as follows:

(1) 17.5 cents per subscriber per month for superstations.

(2) 14 cents per subscriber per month for superstations whose signals are syndex-proof, as defined in § 258.2.

(3) 6 cents per subscriber per month for network stations and noncommercial educational stations.

(b) Commencing January 1, 1998, the royalty fee for secondary transmission of broadcast stations for private home viewing by satellite carriers shall be as follows:

(1) 27 cents per subscriber per month for distant superstations.

(2) 27 cents per subscriber per month for distant network stations.

(3) No royalty rate (zero) for a superstation secondarily transmitted within the station's local market, as defined in 17 U.S.C. 119(d)(11).

(4) No royalty rate (zero) for a network station secondarily transmitted within the station's local market, as defined in 17 U.S.C. 119(d)(11), to subscribers residing in unserved households, as defined in 17 U.S.C. 119(d)(10).

Dated: October 23, 1997.

So Ordered.

James H. Billington,

The Librarian of Congress.

[FR Doc. 97–28543 Filed 10–27–97; 8:45 am]

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DEPARTMENT OF DEFENSE

DEPARTMENT OF TRANSPORTATION

Coast Guard

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AI69

Miscellaneous Educational Revisions

AGENCIES: Department of Defense, Department of Transportation (Coast Guard), and Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the educational assistance and educational benefit regulations of the Department of Veterans Affairs (VA). It removes a number of provisions that no longer apply or otherwise have no substantive effect, and makes other changes for the purpose of clarification.

DATES: This final rule is effective October 28, 1997.

FOR FURTHER INFORMATION CONTACT: June C. Schaeffer, Assistant Director for Policy and Program Administration, Education Service, Veterans Benefits Administration, 202–273–7187.

SUPPLEMENTARY INFORMATION: This document affects 38 CFR part 21, subparts C, D, G, H, K, and L. It removes provisions that are obsolete, duplicative, or otherwise without substantive effect, and makes changes for the purpose of clarification. This document makes no substantive changes. Accordingly, there is a basis for dispensing with prior notice and comment and delayed effective date provisions of 5 U.S.C. 552 and 553.

The Department of Defense (DOD) and VA are jointly issuing this final rule insofar as it relates to the Post-Vietnam Era Educational Assistance Program (VEAP) and the Educational Assistance Test Program (EATP). These programs are funded by DOD and administered by VA. DOD, the Department of Transportation (Coast Guard), and VA are jointly issuing this final rule insofar as it relates to the Montgomery GI Bill—Selected Reserve program. This program is funded by DOD and the Coast Guard, and is administered by VA. The remainder of this final rule is issued solely by VA.

The Secretary of Defense, the Commandant of the Coast Guard, and Acting Secretary of Veterans Affairs hereby certify that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This final rule makes no substantive changes. Pursuant to 5 U.S.C. 605(b), this final rule, therefore, is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

The Catalog of Federal Domestic Assistance numbers for programs affected by this final rule are 64.117, 64.120, and 64.124. This document also affects the Montgomery GI Bill—Selected Reserve program which has no Catalog of Federal Domestic Assistance number.

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflict of interests, Education, Employment, Grant programs-education, Grant programs-veterans, Health care, Loan programs-education, Loan programs-veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.